

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B02

PLR-104760-08

Date:

July 30, 2008

Legend:

Fund =

Corporation =

Index =

State A =

Interest Rate =

a =

b =

c =

d =

Dear :

This responds to the request dated January 29, 2008, and supplemental correspondence dated April 24, 2008, and July 15, 2008, submitted by your authorized representative on behalf of Fund. Fund requests a ruling that income earned from investment in a certain commodity-linked note will constitute qualifying income to Fund

under section 851(b)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code").

Facts:

Fund is a newly-formed series of Corporation, a State A corporation. Corporation is registered as an open-end management investment company under the Investment Company Act of 1940, 15 U.S.C. §80a-1 et. seq., as amended (the "1940 Act"). Fund plans to elect to be taxed as a "regulated investment company" ("RIC") under section 851 of the Code.

Fund intends to seek long-term capital appreciation and income through investing primarily in alternative asset classes (such as real estate, a variety of commodity-related securities and currencies) that historically have had a low correlation to traditional asset classes (such as stocks, bonds and money market securities). Fund expects to pursue this investment objective and strategy, in part, through the investment in a commodity-linked note (the "Note"). The Note will be issued to Fund at an expected par value of \$a and will have a payout based on a formula determined by reference to the Index. The Note will have a term of one year and one day. Fund, as holder of Note, has the right to put the Note to the issuer at the calculated redemption price based on the closing Index as of the next business day after notification to the issuer. In addition, if the Index falls to a level that is equal to or below b% of the beginning Index value on any day, the Note will "knock-out" and automatically redeem based on the closing Index value of the next business day on which trading is generally conducted with respect to the components of the Index.

The repayment obligation upon early redemption, knock-out, or maturity equals the face amount of the Note, plus or minus an adjustment. The adjustment is calculated by multiplying the face amount of the Note by a leverage factor of c (the "Leveraged Face Amount" of the Note) times the percentage of the increase or decrease of the beginning Index level compared to the ending Index level for the applicable period. The total of this amount is then increased by a coupon amount equal to the Interest Rate times the face amount of the Note, and decreased by an annual fee amount equal to d basis points of the Leveraged Face Amount of the Note. Finally, the adjustment is decreased by the reversal of an interest factor that is included in the Index.

Fund makes the following representations with respect to this Note:

- (1) The issuer of the Note will receive payment in full of the purchase price of the Note substantially contemporaneously with the delivery of the Note;
- (2) The Fund while holding the Note will not be required to make any payment to the issuer of the Note in addition to the purchase price paid for the Note, whether as

margin, settlement payment, or otherwise, during the life of the Note or at maturity;

- (3) The issuer of the Note is not subject by the terms of the instrument to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C.A. 2, as amended (CEA); and
- (4) The Note is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Law and Analysis:

Section 851(b)(2) of the Code provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test (the “qualifying income requirement”). Under this test, at least 90 percent of its gross income must be derived from certain enumerated sources. Section 851(b)(2) defines qualifying income, in relevant part, as –

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to [the RIC’s] business of investing in such stock, securities, or currencies . . .

Section 2(a)(36) of the 1940 Act defines the term “security” as –

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(f)(1) of the CEA provides that the CEA is not applicable to a hybrid instrument that is predominantly a security. Section 2(f)(2) of the CEA provides that a hybrid instrument shall be considered predominantly a security if –

- (A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with the delivery of the hybrid instrument;
- (B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;
- (C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and
- (D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Section 2(f)(3) of the CEA provides, in part, that for purposes of section 2(f)(2)(C) of the CEA, mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

Conclusion:

Based on the facts as represented, we rule that income and gain arising from the Note constitute qualifying income to Fund under section 851(b)(2) of the Code.

This ruling is directed only to the taxpayer who requested it, and is limited to the facts as represented by the taxpayer. Section 6110(k)(3) provides that this letter may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

David B. Silber
David B. Silber
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions and Products)